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In the Supreme Court of the United States

OCTOBER TERM, 1993

JAMES CITY COUNTY, VIRGINIA, PETITIONER,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY AND
U.S. ARMY CORPS OF ENGINEERS, RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI BY JAMES CITY COUNTY, VIRGINIA, ON BEHALF OF THE NATIONWIDE PUBLIC PROJECTS COALITION, COBB COUNTY-MARIETTA (GEORGIA) WATER AUTHORITY, METROPOLITAN DENVER WATER AUTHORITY, THE CONSOLIDATED MUTUAL WATER COMPANY OF LAKEWOOD, COLORADO, THE NEW ENGLAND WATER WORKS ASSOCIATION, THE ORANGE COUNTY (N.Y.) WATER AUTHORITY, AND THE COUNTY OF LOS ANGELES, CALIFORNIA

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BRIEF OF THE *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTERESTS OF THE *AMICI CURIAE*

The *amici* represent public sector agencies and private entities providing such basic public services as new and improved water supply facilities, flood control projects, and highways. The *amici* have received petitioner's and respondent's written consent to file this brief and have filed the letters of consent with the Clerk of this Court. The *amici* include:

> *The Nationwide Public Projects Coalition* (NPPC), a not-for-profit corporation whose members include representatives of state, regional, and local governmental agencies and associations and private sector entities providing such basic public services as water supply facilities, irrigation, flood control, transportation, and other infrastructure projects. NPPC was formed to strive for a balance between environmental protection and its members' responsibility to provide for basic public needs and services, and promote reform of federal environmental laws, rules and policies.

The Metropolitan Denver Water Authority (MDWA), a political subdivision and public corporation of the State of Colorado. MDWA, which is made up of over 20 local governments working together to develop water supplies for the Greater Metropolitan Denver, Colorado area, includes cities and water and sanitation districts with a total constituency of more than 300,000 persons.

The Consolidated Mutual Water Company of Lakewood, Colorado, a mutually owned not-for-profit corporation serving nearly 85,000 people. The Company is a contract distributer of treated water and operates its own raw water supply, storage, treatment, and water distribution systems.

The New England Water Works Association (NEWWA), a professional not-for-profit educational association. NEWWA's membership numbers over 2,600 individuals, including engineers, scientist, biologists, chemists, managers, environmentalists, utilities and others interested in the management and operation of water supplies.

Cobb County-Marietta (Georgia) Water Authority, which owns and operates a water supply, treatment, and transmission system. The system serves a primary service area consisting of approximately 345 square miles and an estimated population in excess of 450,000 residents.

The Orange County (N.Y.) Water Authority, established and funded in 1987 by the New York State Legislature. The Authority's proposed supplemental water supply project was never completed, in part, because of its impact to wetlands. Today, the Authority conducts a ground water study, operates a water conservation program, and services approximately 300,000 residents and approximately 500,000 acres of land, of which 57,000 are wetlands.

The County of Los Angeles, California, which operates and maintains Los Angeles County's existing flood control and water conservation facilities serving and protecting the 8.5 million residents within the Los Angeles basin. The County operates and maintains the world's most comprehensive urban flood control and water conservation system, which includes 15 dams and reservoirs and 143 sediment retention facilities.

The issues in this case are of extreme importance to the *amici* and affect a broad range of public interests. The Fourth Circuit's decision affirming the Environmental Protection Agency's (EPA) second veto, if allowed to stand, will have a chilling effect nationally on critical public works and infrastructure projects. The long-range consequences for the American people may be significant decreases in not only the quantity and quality of water supplies, but also the ability to deliver such additional essential public services as flood control and safe transportation systems.

The *amici* believe that there is a dire need to resolve the question of whether EPA may ban construction of a much needed public water supply reservoir without ever considering that no other practicable water supply alternatives exist. The *amici*'s concerns are much broader than those of the petitioner since their diverse members must be able to rely on minimum levels of certainty and predictability in the regulatory processes that comprise the Clean Water Act (CWA) § 404 application process. The *amici*'s members invest countless hours and hundreds of millions of tax dollars planning, assuring financing, preparing for, and constructing public service projects, including water supply projects like the Ware Creek Reservoir. It is absolutely essential that the *amici* know, up front, the rules by which their projects will be judged.

SUMMARY OF REASONS FOR GRANTING THE WRIT

1. The Fourth Circuit's view that EPA's § 404(c) veto power under the CWA is "practically unadorned" gives EPA absolute power to ignore carefully considered public resource objectives underlying many needed public works and infrastructure projects

sponsored by the *amici*. The Ware Creek Reservoir is only one of many projects that could be completely and unilaterally thwarted without even the slightest consideration of the consequences of such a veto on critical human needs.

2. The Fourth Circuit's decision is at odds with any reasonable interpretation of the CWA, and is in conflict with EPA's view upheld by a decision of the United States Court of Appeals for the Second Circuit. The very concept of "unacceptability" in § 404(c) necessarily involves a comparison of a proposal to other options, especially where, as here, no alternatives exist in meeting a vital human need—providing potable water. EPA cannot justify reversal of its long-standing policy regarding consideration of the § 404(b)(1) guidelines and cannot ignore the absence of practicable alternatives in making a veto decision.

3. The Fourth Circuit's decision violates basic principles of federalism and allows EPA to veto carefully considered and well-developed public service projects of state and local governments. EPA should not be allowed to exercise preemptive powers in the absence of a clear statement of congressional intent over important public resource decisions. The absolute deference given EPA greatly reduces the chance for meaningful judicial review.

4. The Fourth Circuit's unduly narrow discussion of CWA § 101(g), which protects the decisionmaking prerogatives of state and local governments in ensuring adequate supplies of potable water, conflicts with congressional intent. Moreover, the Fourth Circuit's decision condones EPA's failure to consider the close interrelationship between water quality and water quantity and allows EPA, in effect, to control water supply and engage in federal land use planning, which § 101(g) seeks to guard against.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S NARROW INTERPRETATION OF THE FACTORS TO BE CONSIDERED IN DETERMINING "UNACCEPTABLE" ADVERSE EFFECTS IGNORES THE SERIOUS CONSEQUENCES OF FAILING EVEN TO CONSIDER THE ABSENCE OF PRACTICABLE ALTERNATIVES TO NEEDED PUBLIC WORKS PROJECTS

The Fourth Circuit's interpretation that EPA's § 404(c) veto power is "practically unadorned" gives EPA absolute power to ignore the important public resource objectives underlying many needed public works and infrastructure projects sponsored by the *amici*. Essentially, by holding that the "broad grant of power" inherent in § 404(c) was only intended to focus on "the agency's assigned function of assuring pure water," the court has licensed EPA to ignore the considered and carefully planned decisions of public resource agencies meeting vital human needs. Unless overturned by this Court, EPA is given broad license to veto public interest projects ***without even considering*** potential and substantial adverse consequences of such a veto on public health and welfare.

A. The Consequences Of The Fourth Circuit's Interpretation Could Be Devastating For Public Resource Projects

The ramifications of the Fourth Circuit's decision on the *amici* are staggering. The *amici* bring together an alliance of regional water, highway, public works agencies, local and state governments, and private sector associations and companies that build vital public works projects. The *amici* are motivated by the increasing difficulty for state and local governments to deliver needed services affordably, efficiently, and on a timely basis, due to the nature and scope of various federal environmental laws, particularly the § 404 program. EPA's unprecedented, self-imposed limitations on the factors to be considered under its § 404(c) review and the relevance of the § 404(b)(1) guidelines, combined with absolute deference given to its decision by the Fourth Circuit, could have the practical effect of allowing EPA to veto any large public resource project such as the Ware Creek Reservoir in a total vacuum without giving consideration to the project's purpose and need.

The Ware Creek Reservoir is only the tip of the iceberg of the kinds of projects that could be completely and unilaterally thwarted without even the slightest consideration of the consequences of such a veto on critical human needs. James City County's (County) efforts to meet the safe drinking water needs of its community are typical of what is happening nationally. A brief overview of the need for public projects underscores the importance of this point.

EPA estimates that the needed capital expenditure to comply with current requirements of the Safe Drinking Water Act is approximately $8.6 billion, primarily for treatment systems.[1] EPA estimates total needs for projects eligible under the CWA is over $137 billion.[2] According to the U.S. Department of Transportation, "we have more than $300 billion in backlogged bridge and highway needs . . . the 'bottom line' is that as a Nation we are investing between $10 billion and $20 billion annually less than we need to keep things at their current performance levels."[3] Further, the Administration has proposed almost $1 billion of new and modified water resources projects, whose purposes include navigation, flood control, water supply, and hydroelectric power.[4] Many of these projects will involve the kinds of § 404 issues that put the Ware Creek Reservoir in its current dilemma.

To put these figures into less abstract concepts, many of the *amici* sponsor flood control projects such as levees and dams. Local and regional planning agencies engage in lengthy studies and needs analyses before even proposing such large flood control impoundments. Under the Fourth Circuit's ruling, EPA could arbitrarily disregard evidence that such projects, as proposed, are necessary for protecting life and property. In the face of such a veto, the local sponsor would not be able to prevent the likely and potentially catastrophic loss of life or property. One can imagine the terrible consequences that might have occurred if EPA had decided to veto an important levee on the Mississippi River, without considering the

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[1] *See* S. Rep. No. 250, 103rd Cong., 2nd Sess. 4 (1994).

[2] *Hearings on Infrastructure Finance Before the Subcomm. on Investigations and Oversight of the House Comm. on Public Works and Transportation*, 103rd Congress, 2nd Sess. 4 (1994) (statement of Michael B. Cook, Director, Office of Wastewater Management, Office of Water, U.S. Environmental Protection Agency).

[3] *Hearings on Infrastructure Finance Before the Subcomm. on Investigations and Oversight of the House Comm. on Public Works and Transportation*, 103rd Congress, 2nd Sess. 2-3 (1994) (statement of June F. Garvey, Deputy Federal Highway Administration Administrator).

[4] *Water Resources Development Act, 1994, Hearings on H.R. 4460 Before the Subcomm. on Water Resources and Environment of the House Comm. on Public Works and Transportation*, 103rd Congress, 2nd Sess. 2 (1994) (statement of John H. Zirschky, Acting Assistant Secretary of the Army (Civil Works)).

risk to life and property from flood damage, prior to the devastating 1993 floods! In commenting on the 1993 floods, the Clinton Administration's August, 1993 Wetlands Policy embraced the comprehensive analysis that *amici* argue is an integral part of the § 404(c) process:

> We must . . . learn from these floods how to more effectively protect human health and safety, property, and the environment. . . . We can identify ways to protect and restore our river and wetlands systems so that they work for us, integrated with structural flood control measures.

White House Office of Environmental Policy "Protecting America's Wetlands: A Fair, Flexible and Effective Approach," p. 26, (Aug. 24, 1993).

The potential effects of the Fourth Circuit's ruling are very evident when one considers the plight of the *amici* in the West that often must dredge channels to remove accumulated sediment and vegetation within normally dry watercourses frequently impacted by urban runoff. *Amicus*, Los Angeles County Department of Public Works (DPW), is very concerned about the impact of the Fourth Circuit's decision on its critical sediment removal program. The DPW operates and maintains the most comprehensive urban flood control and water conservation system in the world. The system was designed to control flood waters and operate in alternating wet/dry cycles by removing eroded sediment from the flood waters. Accumulated sediment, if not removed, can jeopardize the system's function. The DPW only has six months of dry weather to address the impacts of each storm season before the next storm season arrives. The DPW is concerned that regulatory uncertainties in the § 404 permit program as raised by the Fourth Circuit's decision could severely jeopardize its ability to remove an estimated seven million cubic yards of sediment annually. Indeed, the lives and property of Los Angeles County residents are directly dependent on the DPW's ability to quickly maintain existing facilities with as little bureaucratic interference as possible. The DPW believes that the Fourth Circuit's decision will give EPA license to ignore such vital needs.

B. The Fourth Circuit's Decision Could Have A Severe Chilling Effect On The Process Of Developing And Approving Important Public Resource Projects

The Fourth Circuit's decision could severely impact the *process* of decision making for many vital projects sponsored by the *amici*. Admittedly, EPA has fully exercised its veto power infrequently (12 times). However, EPA often threatens to use its veto power in order to gain concessions from project applicants. The Fourth Circuit ruling could lead to an increased use of this threat in a fashion that totally ignores the delivery of vital public services. Indeed, the recent EPA trend is to veto public resource projects. The *amici* recognize that a legitimate objective of the § 404 program is to shift development away from wetlands. However, this rationale of encouraging project sponsors to avoid impacts to aquatic resources serves no purpose where there is no alternative way to meet the community's needs other than the proposed project. Here, in sustaining EPA's second veto, the Fourth Circuit swept aside the herculean effort, commencing in 1979, that went into the review and approval of the Ware Creek project without even the barest consideration of the fact that no alternatives existed. In doing so, the Fourth Circuit gave full, controlling deference to EPA's finding that "unacceptable" can mean whatever EPA believes may be relevant in a particular case.

In light of the typical lengthy process for constructing such projects and the always present threat of a veto, the Fourth Circuit's decision sends the signal to the *amici* that EPA can totally ignore massive expenditure of planning time, resources, and tax dollars if it concludes at the end of the process that the project's effects are "unacceptable," without regard to whether a project is absolutely essential to meet critical needs. In effect, EPA is given license to change the rules of the game whenever it suits its purpose, regardless of the project sponsor's expectations of the rules at the start of the permit approval process. Such a signal will undoubtedly give pause to sponsoring agencies in undertaking such an extended process, even if their constituents will suffer by lack of action. Unless overturned by this Court, the Fourth Circuit's interpretation essentially removes any reasonable limits to EPA's ultimate power to arbitrarily overrule the decisions of public resource agencies.

C. The Necessity Of A Project In Supplying Water Is An Environmental And Water Quality Concern Of The First Order And Must Be Considered By EPA

The Fourth Circuit's view of EPA's "unadorned" veto authority is simply at odds with any reasonable interpretation of the CWA. As the federal district court judge, Judge MacKenzie, stated in reviewing this veto decision, "The EPA neglects a significant consideration, however, when it completely ignores James City County's desperate need for water. . . . While normally one would anticipate a situation where fill was ruining the water supply, in this case, the refusal to allow a project has an adverse effect on municipal water supplies." *James City County v. EPA*, 23 Envtl. L. Rep. (Envtl. L. Inst.) 20,228, 20,229 (E.D. Va. Aug. 5, 1992). Thus, while Judge MacKenzie recognized that EPA's § 404(c) regulations do not identify each of the limitless considerations that EPA must evaluate in determining a project's acceptability, quite clearly, the "need for water" is a relevant factor where there is a vital public need.

Here, the record below clearly indicates that the County considered the Ware Creek Reservoir necessary to meet the needs of a population that is anticipated to grow from a population of 24,000 residents in 1981 to over 50,000 residents by the year 2030. Indeed, in its earlier opinion, the Fourth Circuit cited the extensive studies and reports documenting the factors limiting the County's ability to satisfy its increasing need for quality drinking water with its current deteriorating sources and determined that the Ware Creek Reservoir is the only project large enough to supply minimum projected needs. *James City County v. EPA*, 955 F.2d 254, 256 (4th Cir. 1992).

The very concept of "unacceptability" that is at the heart of the § 404(c) veto begs the question of "compared to what?" This determination cannot be understood from only the single dimension viewpoint put forward by EPA, to which the Fourth Circuit unquestioningly deferred. It necessarily involves a comparison, made on a case-by-case basis, of a proposed project to other scenarios, particularly where no alternatives exist to achieving a basic public need. EPA cannot, as they have done here, construe the § 404(c) process so narrowly as to summarily ignore the history of the project and the practical effect of denying the ability of the County to develop this

urgently needed source of domestic water supply. "Patently, these considerations of history and practical effect would, in a rational decision, warrant at least some discussion." *Puerto Rico Sun Oil Co. v EPA*, 8 F.3d 73, 78 (1st Cir. 1993), *citing Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983). In other § 404(c) veto determinations, the question of alternatives was an integral consideration in EPA's deliberations. It is only now, when there is no available alternative, that EPA changes the rules to say it is not a relevant consideration. This flip-flop cannot be tolerated since EPA's current posture is "in some measure at odds with precedent." *Puerto Rico Sun Oil*, 8 F.3d at 78. EPA, in vetoing the project twice, failed to analyze the effect of a veto on the fulfillment of the project's purpose in the face of no alternative way to meet that purpose.

In remanding this case, the Fourth Circuit never told EPA to put blinders on and ignore the absence of practicable alternatives. Rather, EPA was to determine, "in the absence of practicable alternatives," whether "considerations of environmental effects would alone justify a veto." *James City County*, 955 F.2d at 260. In conducting this evaluation, EPA was required to apply "relevant" portions of the § 404(b)(1) guidelines. EPA's unduly narrow interpretation of its authority is at odds with the guidelines, which are based on the CWA § 403 ocean discharge criteria. Those criteria take a broad, comprehensive approach to the analysis of environmental impacts and alternatives and require consideration of "the availability of other possible locations and methods of disposal." Section 403(c)(i)(F), 33 U.S.C. § 1343.

Indeed, the United States Court of Appeals for the Second Circuit has affirmed the district court's holding that the guidelines, like the § 403(c) criteria, *mandate* consideration of the "availability" of alternatives. *Bersani v. EPA*, 674 F. Supp. 405, 414 (N.D.N.Y. 1987) *aff'd Bersani v. Robichaud*, 850 F.2d 36 (2d Cir. 1988), *cert. denied* 489 U.S. 1089 (1989). ("The 404(b)(1) guidelines likewise mandate consideration of the availability of other possible locations in order to minimize unnecessary destruction of aquatic resources." *Id.*) In exercising its veto in *Bersani*, EPA fully recognized within this mandate that the *context* of the guidelines is always relevant in

determining "unacceptability" under § 404(c). *Id.* at 415 ("As a matter of common sense, as well as regulatory practice, the 'acceptability' of an adverse effect may depend on the extent to which that effect is avoidable. The alternative provisions, as well as other portions of the § 404(b)(1) Guidelines, thus are necessarily relevant to a § 404(c) determination.").[5] Thus, EPA's waffling has resulted in a conflict between circuits. In *Bersani*, EPA considers the alternatives issue under the guidelines as an essential consideration and strongly asserts that it is "mandated" to consider the existence of practicable alternatives, a position that was subsequently upheld on judicial review. In this case, EPA completely disregards the absence of practicable alternatives under the guidelines, contradicts its prior policy and justifies its veto solely on findings of adverse effects to the aquatic environment.

EPA cannot justify this waffling by asserting that it is allowed under its veto regulations. Rather, those regulations embody the mandate that the context of the guidelines is always relevant in determining "unacceptability" under § 404(c). EPA expressly recognizes that it must look at the consequences of vetoing a project for environmental reasons. The preamble to EPA's veto regulations stating that its veto may "stop a project entirely" because the loss of the § 404(c) resource may still be so great as to be "unacceptable," necessarily means that the agency must consider the absence of a practicable alternative to fulfill the project's purpose when it decides to veto solely on the project's environmental effects. 44 Fed. Reg. 58,078 (Oct. 9, 1979). Thus, EPA tacitly acknowledges that it cannot apply "relevant portions" of the guidelines in a vacuum, without ever considering the lack of alternatives.

Further, EPA cannot reasonably maintain that applying "relevant portions" of the § 404(b)(1) guidelines means total ignorance of a lengthy administrative record and adjudicated finding that a particular water supply project is absolutely essential. The § 404(c) veto regulation defines "unacceptable adverse effect" as "significant degradation" within the meaning of the guidelines. An analysis of EPA's

[5] *Petition for Writ of Certiorari*, at 27, *James City County v. EPA*, (No. 93-2045), *quoting* the Final Determination of the Assistant Administrator for External Affairs concerning the Sweedens Swamp Site in Attleboro, Massachusetts Pursuant to § 404(c) of the Clean Water Act (May 13, 1986), CR 62 Exhibit 4 at 14.

guidelines reveals that the existence (or non-existence) of practicable alternatives is a fundamental element of the framework for a decision ("no discharge of dredged or fill material shall be permitted if there is a practicable alternative . . . which would have less adverse impacts on the aquatic ecosystem." 40 C.F.R. § 230.10(a)(2)).

The § 404(b)(1) guidelines explicitly state that "[f]indings of significant degradation related to the proposed discharge shall be based upon appropriate factual determinations, evaluations and tests required by subparts B and G, after consideration of subparts C-F." 40 C.F.R. § 230.10(c). Subpart B covers "Restrictions on discharge" and regulates unnecessary destruction of aquatic resources, including stringent presumptions against such discharges for non-water dependent projects, which are designed to "force a hard look at the feasibility of using environmentally preferable sites." Preamble to CWA, 45 Fed. Reg. 85,339 (Dec. 24, 1980). Given the guidelines' statement that "degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources," "unacceptability" under the § 404(c) regulations logically includes not only the absolute "magnitude of the loss but also the avoidability of the loss." *Bersani v. EPA*, 674 F. Supp. at 415, *noting* 40 C.F.R. § 230.1(d). Thus, EPA recognizes that "unacceptability" necessarily involves a comparison with other scenarios, especially a situation where no alternatives exist in achieving the basic purpose of a project.

Here, the *context* of the analysis called for by the guidelines must require consideration of the lack of practicable alternatives for meeting the project's purpose. The *context* is the delivery of a vital resource—potable water. It is simply absurd to say that EPA can ignore this concern here because the statute does not expressly define the criteria for determining "unacceptability."

II. THE FOURTH CIRCUIT'S DECISION VIOLATES BASIC PRINCIPLES OF FEDERALISM IN ALLOWING EPA TO VETO CAREFULLY CONSIDERED AND WELL-DEVELOPED PROJECTS OF STATE AND LOCAL GOVERNMENTS WITHOUT CONSIDERING THE NEED FOR THE PUBLIC PROJECT OR THAT IT IS THE ONLY MEANS AVAILABLE TO ACHIEVE AN ESSENTIAL PUBLIC SERVICE

The Fourth Circuit determined that "the district court erred in failing to recognize the deference due the EPA's determination." *James City County v. EPA*, 12 F.3rd. 1330, 1338 (4th Cir. 1993). The question posed here is: What should be the standard of "the deference due the EPA's determination"? The standard was not articulated by the circuit court, nor has it been addressed previously by EPA in a comparable situation where there is an essential public project for which there is no alternative. This Court has the opportunity to craft a standard of deference that will provide the guidance so urgently needed by public resource agencies attempting to fulfill their mandates, consistent with the principles of federalism and the policies of the CWA, in the face of EPA's § 404(c) veto authority. Otherwise, needed public projects could be vetoed with little chance for meaningful judicial review.

A. By Deferring Fully To EPA's Decision, The Court Is Allowing EPA To Exercise Preemptive Powers Over Important Local Decisions Contrary To Principles Of Federalism And In The Absence Of A Clear Statement Of Congressional Intent

The Fourth Circuit's decision profoundly impacts the basic functions of water supply agencies and other providers of essential public services. Since this issue essentially is a question of first impression, it is useful to go back to basic principles. This Court continues "to recognize that States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556 (1985). This is a fundamental principle of federalism. A corollary also recognized is that there is a fundamental difference between providing essential public services (*e.g.*, assuring adequate supplies of safe, quality drinking water in conformance with federal requirements), and accommodating private sector, entrepreneurial activities. *See C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994). This special position is protected against federal

"overreach" that clearly intrudes into matters traditionally reserved to state and local governments, which the courts have held cannot be permitted unless there is a clear statement of congressional intent. Though acknowledging in *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2400 (1991), that "Congress may legislate in areas traditionally regulated by the States," Justice O'Connor carefully noted that this "is a power that we must assume Congress does not exercise lightly." *Id.*

The CWA explicitly adopts the fundamental principle of federalism, as recognized in *Gregory*, that there are not exclusive but rather overlapping spheres of authority, between the federal government and state and local governments. "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources." Section 101(b), 33 U.S.C. § 1251. Nothing in the CWA is to "be construed as impairing or in any manner affecting any right or jurisdiction of the states with respect to the waters . . . of such States." Section 510, 33 U.S.C. § 1370.

The effect of the Fourth Circuit's ruling giving EPA unquestioned deference is to create in § 404(c) a back door, *de facto* preemption of the authority of a state or local public agency to provide essential public services, in contravention of the principles of federalism and comity. Under these principles, a court must "fairly but—in light of the strong presumption against preemption—narrowly construe the precise language [in construing § 404(c)]." *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2621 (1992). "[I]f an agency does not speak to the question of preemption, we will pause before saying that the mere volume and complexity of its regulations indicate that the agency did in fact intend to preempt." *Hillsborough County v. Automated Medical Lab., Inc.*, 471 U.S. 707, 718 (1985).

In sum, giving deference to EPA's one-dimensional implementation of its § 404(c) veto authority and ignoring the consequences of the lack of any alternative source of drinking water despite the clear requirements of the CWA and EPA's prior practice, effectively enables EPA to arrogate power over state and local governments, contrary to the purposes of the CWA and federalism.

B. Any Presumption Of Controlling Deference To EPA Is Reduced Where There Is An Essential Public Project For Which There Is No Practicable Alternative

All of the explicit and implicit protections of federalism and comity provided by law and statute are meaningless if EPA is given such controlling deference that it amounts to a license to exercise its veto authority without regard to all of the careful land use and resource allocation determinations by state and local agencies that are engaged in the essential public activity of supplying water and other essential infrastructure needs, without the opportunity for meaningful judicial review. In this context, it must be determined whether the Fourth Circuit was correct in its absolute, unquestioning deference given to EPA.

EPA is entitled only to "an appropriate level of deference." *Arkansas v. Oklahoma*, 112 S. Ct. 1046, 1060 (1992), *noting Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-44 (1984). It is not "appropriate" that EPA's decision should be given controlling deference when, as here, the agency's interpretation is a reversal of longstanding interpretation. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987). Where legislation contains diverse purposes, the most reliable guide for that task is the text of the legislation, and thus deference will not be given to agency interpretations of that legislation. *City of Chicago v. Environmental Defense Fund*, No. 92-1639, 1994 WL 156943, at *7 (May 2, 1994). Nor should EPA be entitled to deference where is has not taken a "hard look" at the relevant issues. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 933 (1971). Ultimately, to merit deference, "in the end an agency decision must also be rational . . . even in technical areas of regulation." *Puerto Rico Sun Oil*, 8 F.3rd at 77.

Further, deference is not due EPA where the County "can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *C & A Carbone*, 114 S. Ct. at 1683, *citing Maine v. Taylor*, 477 U.S. 131 (1986). The Fourth Circuit had remanded the initial district court decision overturning EPA's veto with a clear determination that there is no practicable alternative to the proposed Ware Creek Reservoir to supply potable

water for the County. In fact, the Fourth Circuit directed EPA that, as a matter of law, there was no alternative to the proposed project, not that it was prevented from considering the lack of alternatives in determining whether the environmental effects were unacceptable. *James City County*, 955 F.2d at 260.

The principles of federalism and comity and the teachings of interstate commerce clause discrimination cases, which limit federal power to preempt state and local government actions, are relevant here to provide guidance as to the degree of deference to be given when EPA's action overrides the ability of a public agency to carry out an essential public service by the only means available. At one extreme is the standard used by the Fourth Circuit, which gives EPA absolute deference. At the other is the concept that full deference be given to a state or local public entity. The *amici* are suggesting a middle-ground: the presumption of deference to EPA is reduced or rebutted where there is an essential public project for which there is no practicable alternative. This case presents competing legitimate public policy interests,requiring a weighing or balancing of the public project's pros and cons, certainly at least an assessment, to determine whether the project effects are "unacceptable" under § 404(b)(1). This assessment requires an analysis similar to that employed in cases of interstate commerce discrimination, where "[T]he question becomes one of degree," and its answer depends on the nature of the local interest, and the availability of alternative methods for advancing the local interest without hindering the national one. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

If absolute deference is given to EPA's narrow reading of the procedure for making a § 404(c) veto determination, then virtually every infrastructure project impacting a wetland can be vetoed with little chance for meaningful judicial review. Instead, as argued here, the absolute deference granted EPA by the Fourth Circuit should be circumscribed for an essential public project with no practicable alternative.

III. THE FOURTH CIRCUIT'S UNDULY NARROW DISCUSSION OF SECTION 101(g) CONFLICTS WITH THE STATED PURPOSE OF THAT SECTION TO PROTECT THE DECISIONMAKING PREROGATIVES OF STATE AND LOCAL GOVERNMENTS IN ENSURING ADEQUATE SUPPLIES OF POTABLE WATER

A. EPA Fails To Consider The Close Interrelationship Between Water Quality And Water Quantity As Required By The Clean Water Act

The Fourth Circuit acquiesced in EPA limiting the scope of § 404(c) to water quality, without consideration of the CWA's interweaving of both water quality and water quantity. It similarly dismissed the critical mandate of § 101(g) as "limited to assuring purity [of water] in whatever quantities the state and local agencies provide." *James City County*, 12 F.3rd at 1336. Section 101(g) sets the framework for § 404(c) permit issuance for public water supply projects, codifying principles that federal agencies must follow when water quality, water quantity, and wetlands protection interests are at issue. Section 101(g) explicitly directs federal agencies—EPA is not excepted—to cooperate with state and local agencies to "develop comprehensive solutions to prevent, reduce and eliminate pollution *in concert with programs for managing water resources*." 33 U.S.C. § 1251(g) (1982) (emphasis added).

The Fourth Circuit's summary dismissal of § 101(g) sets a dangerous precedent by allowing EPA to ignore the exercise of important and legitimate state and local authority over managing water resources and assuring that the public is provided potable water in sufficient quantities. As this Court held in *PUD No. 1 of Jefferson County and City of Tacoma v. Washington Department of Ecology*, 114 S. Ct. 1900 (1994), to assert that the CWA is concerned solely with water quality and does not allow consideration of water quantity is an artificial distinction. "It is the purpose of this [§ 101(g)] amendment to insure that State allocation systems are not subverted, and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations." *Id.* at 1913-14, *referring to and quoting* 3 Legislative History of the Clean

Water Act of 1977 (Committee Print compiled for the Committee on Environment and Public Works by the Library of Congress), Ser. No. 95-14, p. 532 (1978). EPA cannot ignore, as it did with the Ware Creek project, important public service water supply concerns on the grounds that these concerns relate to quantity, not quality, and therefore are outside the scope of § 404(c). There is no ambiguity here—the Fourth Circuit's interpretation of § 404(c) is in conflict with the express language of § 101(g), undercutting the exercise of state and local authority guaranteed by the CWA.

B. EPA's Narrow Reading Of Section 101(g) Conflicts With The Act's Protections Against Federal Control Of Water Supply And Federal Control Over State And Local Land Use

By affirming EPA's arrogation of discretion to veto a water supply project without consideration of any factors other than environmental impacts, the Fourth Circuit allows the federal government, in effect, to control water supply and engage in federal land use planning, which § 101(g) seeks to guard against. The power to control the allocation of water is the power to control the use of the land.

Section 101(g) expressly provides that "[i]t is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." 33 U.S.C. § 1251(g). These sentences reaffirm the well-established deference by Congress to the jurisdiction and role of state water allocation systems. The Fourth Circuit's decision, however, does not square with Congress's reaffirmation of the fundamental principles of federalism that states are free to choose their own allocation doctrine, how quantities of water should be allocated among competing uses, and how these water rights shall be administered. If allowed to stand, the Fourth Circuit's affirmance of EPA's veto will, in effect, allow EPA and the Army Corps of Engineers (Corps) to make water allocation and re-allocation deter-

minations with unfettered discretion and without regard to what are often extensive, comprehensive, and expensive state water and land use programs.

The proposed construction of the Ware Creek Reservoir brings this point squarely into focus. EPA has disagreed extensively with the findings of not only the Corps, but also Virginia's State Water Control Board. Both agencies found the reservoir to comply with all applicable environmental requirements. By allowing EPA to ignore these state findings, the Fourth Circuit not only disregards congressional intent, but also sends the signal to state and local agencies that their efforts in evaluating water resource projects may be futile and be overturned without recourse.

Nor does the decision square with other circuits' construction of § 101(g). In *National Wildlife Fed'n. v. Gorsuch*, 693 F.2d 156, 179 (D.C. Cir. 1982), the court construed § 101(g) as expressing congressional "intent to minimize federal control over state decisions on water quantity." A later case, *Riverside Irrigation District v. Andrews*, 758 F.2d 508 (10th Cir. 1985), underscored the *Gorsuch* court's conclusion: "Congress did not want to interfere any more than necessary with state water management." *Id.* at 513, *citing Gorsuch*, 693 F.2d at 178. To the extent that the Fourth Circuit's decision flies in the face of congressional intent and interferes with a state or local government's abilities to carry out water and land use management responsibilities, it must not be allowed to stand.

CONCLUSION

For these reasons and the reasons in the petition for writ of certiorari, this Court is urged to issue a writ of certiorari to review the decision of the Fourth Circuit.

Respectfully submitted,

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